

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

HILDA FRANZEN and THE TULALIP)	.
TRIBES,)	
)	
Appellants,)	
)	SHB Nos. 87-5 & 87-6
v.)	
)	FINAL FINDINGS OF FACT,
SNOHOMISH COUNTY, BCE)	CONCLUSIONS OF LAW
DEVELOPMENT, INC., and State of)	AND ORDER
Washington, DEPARTMENT OF ECOLOGY,)	
)	
Respondents.)	

This matter, a request for review of the approval by Snohomish County of a shoreline substantial development permit, shoreline conditional use permit and shoreline variances, came on for formal hearing before the Shorelines Hearings Board, Judith A. Bendor (Presiding), Wick Dufford, Lawrence J. Faulk, Nancy R. Burnett, Robert Schofield and William T. Geyer, convened at Everett, Washington, on November 30, December 1 and 2, and in Lacey, Washington, on December 3, 4, 7 and 8, 1987.

2 Appellant Tulalip Tribes was represented by Mason Morissett and
3 Mark Huth, attorneys at law. Appellant Hilda Franzen appeared by her
4 attorney, J. Richard Aramburu. Respondent Snohomish County was
5 represented by Sue A. Tanner, Deputy Prosecuting Attorney. Respondent
6 BCE Development Inc. was represented by Craig V. Wentz, attorney at
7 law.

8 Evergreen Court Reporting recorded the proceedings on November 20,
9 December 1 and 2, 1987. Gene Barker and Associates recorded the
10 proceedings on December 3, 4 and 8, 1987. Robert H. Lewis &
11 Associates recorded the proceedings on December 7, 1987.

12 Presentation of evidence at the hearing was limited by the Board's
13 order dated July 23, 1987, in which the Board concluded that it had no
14 jurisdiction to hear or decide issues raised by appellants relating
15 to: (1) the facial validity of the Snohomish County Shoreline
16 Management Master Program, (2) violations of state and federal
17 constitutional guarantees, (3) violations of federal treaty rights and
18 (4) violations of civil rights under 42 U.S.C. Sec. 1983.

19 During the course of the hearing, witnesses were sworn and
20 testified, exhibits were examined and admitted. Written argument was
21 later submitted. From the testimony, evidence and contentions of the
22 parties, the Board makes these
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FINDINGS OF FACT

I

Respondent BCE Development (BCE) owns approximately 2,600 feet along the east shore of Possession Sound in Snohomish County, Washington, within which it proposes to build a marina.

The proposed project is to be located approximately 3.5 miles south of the Mukilteo Lighthouse and approximately due west of Paine Field. It encompasses uplands, tidelands, and subtidal areas. The subtidal and intertidal lands lie west of the Burlington Northern Railway (BNRR) right-of-way which is located on a rock revetted roadbed running along the shore from Everett to Seattle.

The 1,000 foot wide strip in the center of the the site is designated an "urban" environment by the Snohomish County Shoreline Master Program (SCSMP) from 200 feet above the ordinary high water mark to the line of extreme low tide.

The remainder of the tideland portions of the property and the entirety of the Possession Sound subtidal bedlands are designated as "conservancy" in the SCSMP. The "urban" designation within the BCE ownership is the only such designation for many miles along the Possession Sound shoreline.

II

The marina proposal before this Board is a revised version of an earlier much larger proposal which was rejected by the County.

1 In the present proposal the marina consists of 340 berths, within
2 a roughly rectangular dredged moorage basin covering approximately
3 14.6 acres surrounded by breakwaters covering 4.8 acres of intertidal
4 and subtidal areas. Approximately 200 floating berths will be covered
5 and 140 will remain open. Associated upland improvements will consist
6 of roadways and parking lots for 180 vehicles. About 2 1/2 acres of
7 impervious surface will be added.

8 The breakwaters will be solid type rubblemound structures,
9 extending in total approximately 2,650 lineal feet. The north and
10 west walls will form a continuous barrier bending at the moorage
11 basin's northwest corner. A single navigational access channel from
12 Possession Sound into the moorage basin will be located at the
13 southwest corner of the project. A gap will be left between the BNRR
14 revetment on the bank and the landward ends of the north and south
15 breakwater walls, providing an open corridor, about 100 feet wide,
16 along the nearshore area of the site.

17 The floating berths will range in length from 32 feet to 60 feet,
18 with an average berth size of about 45 feet. The floats will be
19 constructed of concrete or other durable materials and will be moored
20 with timber piles.

21 A fuel dock will be located at the northwest corner of the moorage
22 basin. Fuel will be stored in two tanks buried on shore with a
23 capacity of about 10,000 gallons each. Boat sewage pumpout facilities
24 will be installed in the fuel dock area.

1 Access from the upland to the marina will be provided by an
2 aerial, pedestrian bridge extending from the upland portion of the
3 site over the BNRR tracks to a three-level marina entry building.
4 This building will be constructed on pilings and will contain space
5 for a harbor master's office, yacht club, moorage owner's facility,
6 yacht brokerage, marine supplies, restroom and public viewing areas.
7 A floating walkway will extend north and south from this building
8 nearly to the landward ends of the breakwater.

9 III

10 The marina is to be a part of Harbour Pointe, a mixed use planned
11 community which occupies the uplands on top of the steep bank to the
12 east of the BNRR right-of-way. Harbour Pointe involves industrial,
13 commercial and residential development over more than 2,300 acres.

14 Approximately 19 acres of the marina project (parking lots and
15 roadway) lie up the bluff east of the BNRR track. Because of the
16 terrain no parking will be available directly adjacent to the marina
17 itself. Cars will be able to drive to and turn around at the
18 Pedestrian bridge passing over the railway, but the parking facilities
19 will be further inland. Two lots are planned, a short-term parking
20 area with 100 stalls and a long-term parking lot with 80 stalls.

21 The Honeywell Company has recently completed a research facility
22 directly east of the marina's long-term parking area and proposes
23 further development due north of its existing facility.
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IV

Not only the proposed site but the adjacent areas along the shore both north and south are characterized by a steep, heavily wooded bank extending up immediately to the east of the BNRR right of way.

The right of way itself is substantially composed of rip-rap, providing a sort of armor plating which has stabilized the bank and shore.

Residential development in the area is largely confined to the top of the bank and further inland. An exception is the Franzen property which lies just to the south of the BCE tract. There a sandy spit has been formed which provides some upland to the west of the BNRR tracks.

On this spit is a small home occupied by respondent Hilda Franzen, who with her family settled there in about 1930. On the site, north and west of the Franzen home lies the hull of the ship "Pacific Queen" which remains where it was beached in about 1961.

V

Most of the shoreline from Mukilteo to Edmonds shores is designated "conservancy" under the SCSMP. There are several small "natural" environments, one of which includes the Franzen property. The BCE tract contains the only "urban" shoreline in the area.

The underlying county zoning of the BCE waterfront is heavy industry and light industry. The light industry area occupies 1,000

feet of frontage. The precise location of the "urban" shoreline area is unclear from the shoreline maps used. However, the marina project plans were developed on the understanding that the "urban" shoreline designation coincides with the light industry zoning. This understanding represents Snohomish County's interpretation of its own master program. We are not persuaded on this record that this interpretation is incorrect.

Accordingly we find that the "urban" shoreline is located where it appears on the project site plan drawings submitted for this marina development by BCE.

VI

The project under consideration will occupy approximately 1,200 feet of shorefront. Though less than half as large as the initial plan, the present proposal occupies the entirety of the area designated "urban" shoreline within BCE's property and more. To maximize marina use of the "urban" environment, the plans call for placing the north and south walls of the breakwater just across the boundary on the adjacent "conservancy" tidelands. Similarly a portion of the western (or outer) breakwater wall will extend past the waterward "urban" designation boundary at the line of extreme low tide and occupy "conservancy" bedlands beyond.

VII

The dredging of the moorage basin is necessary at the site because

1 the intertidal area is a wide shallow shelf. This shelf extends 800
2 to 1,000 feet offshore before dropping sharply into the depths of
3 Possession Sound. The proposal calls for the removal by clam-shell
4 dredge of approximately 250,000 cubic yards of intertidal sediment for
5 the basin. The dredging will bring the basin to an elevation of -10
6 feet MLLW. The dredge spoils from the project are to be disposed of
7 at a state approved disposal site.

8 Once the basin is built, a minor amount of additional dredging
9 will have to be done seaward of the extreme low tide line at the
10 southwest corner of the project in order to create navigational access
11 to the basin. The subtidal area involved belongs to the State of
12 Washington and is a shoreline of statewide significance under the
13 Shoreline Management Act (SMA). This small area (160 feet long and
14 100 feet wide) will be dredged to an elevation of -12 feet MLLW.

15 VIII

16 On June 26, 1986, BCE filed a Master Permit Application with
17 Snohomish County for the present marina proposal. The application
18 embodied several subparts. First, a shoreline management substantial
19 development permit was sought for the construction of a marina within
20 an "urban" environment, including dredging, construction of bulkheads
21 and construction of roads/parking/utilities.

22 Next, BCE sought a shoreline management conditional use permit to
23 to locate a portion of the marina and to construct breakwaters within
24

1 a "conservancy" environment. Finally, BCE sought two variances from
2 SCSMP regulations; one regarding the requirement for a boat launch
3 facility at marinas, and one regarding the limitation of dredging to
4 maintenance dredging in a "conservancy" environment.

5 On October 3, 1986, the Snohomish County Department of Planning
6 and Community Development, Planning Division, issued its staff
7 analysis recommending issuance of the above-described approvals.

8 On October 21, 1986, the Snohomish County Hearing Examiner
9 convened a public hearing and took evidence on BCE's application. The
10 Hearing Examiner issued his decision on December 26, 1986, granting
11 the requested substantial development permit and recommending approval
12 of the conditional use permit and variance requests by the Department
13 of Ecology (DOE). The approval was made subject to five pages of
14 special terms and conditions.

15 On January 26 and 27, 1988, the instant proceedings were initiated
16 by the filing of requests for review with the State Shorelines
17 Hearings Board. Subsequently DOE approved the conditional use permit
18 and variance recommendations of the hearing examiner, and this
19 approval also became the subject of these appeals.

20 IX

21 The marina project as approved will have effects on public access,
22 on the environment and on other uses of the land and water in the
23 neighborhood.

24
25 FINAL FINDINGS OF FACT,
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After our review, we have decided that the effects on public access will, with the addition of some modest conditions to the permit, be distinctly positive.

Overall we further believe that the proposal is designed and will be conducted in a manner so as to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area. We find it more probable than not that construction and operation of the project will not cause significant adverse environmental impacts.

Moreover, we are persuaded that any interference with other shoreline uses resulting from the project will be modest, and that the proposed development is not incompatible with such uses.

X

There is a shortage of seawater moorage within Snohomish County and adjacent King County. The large marinas at Everett, Shilshoe Bay, and Des Moines, all have waiting periods amounting to several years for new applicants for moorage space. In this situation, new moorage facilities serve to increase public access to the shorelines. Moreover here, though the moorage facilities themselves will be rented or sold to individuals, the public at large will be welcomed to parts of the site and access to the shorelines for the public will be vastly improved.

2 The upland roads will provide an easement for the public to get
3 down to the site and the pedestrian overpass will substantially reduce
4 the safety risk posed by the actively used railroad line. Once at the
5 marina, pedestrians will be able to walk along the top of the north
6 breakwater and at low tide descend onto the beach areas to the north
7 of the boat basin. Access to these areas will be from the floating
8 walkway paralleling the shore and passing below the elevated marina
9 entry building. The floating walkway is to be connected to the entry
10 building and pedestrian overpass via elevator and ramp. A public
11 viewing platform will also be incorporated into the marina entry
12 building.

13 XI

14 We find implicit in the proposed plans relating to public access
15 an undertaking to include the public access features in covenants
16 which are recorded against the property and will be enforceable
17 against any subsequent owners. Moreover, provisions for public access
18 are of little value if no one is made aware of them. Therefore, we
19 find that for the public components of the project to function
20 effectively in enhancing shoreline access, the portions of the site
21 which are open to all should be clearly indicated by appropriate
22 signs, and the existence of a marina with public access features
23 should be announced by signs at entrances to Harbour Pointe from the
24 state highway.

XII

Samples taken in Possession Sound near Mukilteo in 1983, showed violations of state water quality standards with respect to temperature and coliform bacteria. The high coliform levels were due to sewage outfalls located within one mile of the marina site at Picnic Point and Olympus Terrace. Shellfish beds located on and adjacent to the project site have not been certified for commercial harvest largely due to the coliform levels

XIII

By the terms of the County's approval, the marina will be subject to the following conditions regarding wastewaters from boats.

The discharge of contaminated bilgewater and sanitary wastes to the marina's waterway is expressly prohibited. Boaters shall be required to retain all sewage wastes within internal holding tanks regardless of the type of vessel disposal system. No in-water discharge of sewage wastes of any kind, whether treated or not, shall be allowed while vessels are moored or operating within the marina. (Permit paragraph 0.2.)

A boat sewage pump-out facility shall be installed in the marina and shall be available to all boaters using or visiting the marina. Final design plans and specifications of this facility shall be submitted to and approved by the Washington State Department of Ecology in addition to any local approvals required by either the Snohomish Health District or the Olympus Terrace Sewer District. (Permit paragraph 0.3.)

The marina shall prominently display signs throughout the facility stating: "It shall be unlawful for any person to discharge sanitary wastes, refuse, oils, or any pollutants into the waters of the state. Chapter 90.48 RCW." (Permit paragraph 0.7.)

1 We find that these conditions, if implemented, will satisfactorily
2 protect the state's waters and around the site from pollution from
3 sanitary wastes from the marina's boats. Despite fears to the
4 contrary, we are not persuaded that these conditions cannot be
5 effectively implemented.

6 XIV

7 The County's approval also includes the following conditions
8 regarding the handling of fuel and oil:

9 The fuel float shall be equipped with an oil spill
10 containment boom system available for immediate
11 deployment in the event of a fuel leak. The boom system
12 shall be capable of encircling the entire berthing face
13 of the fuel pier and any vessels which may berth at the
14 pier. Sufficient quantities of absorbent pads and
15 other cleanup materials shall be stored nearby on the
16 dock and shall be available for immediate deployment in
17 the event of a spill. (Permit paragraph K.)

18 Prior to the issuance of a certificate of occupancy for
19 any portion of the marina facility: . . . 2. An oil
20 spill contingency plan shall have been submitted to and
21 approved by the Washington State Department of Ecology.
22 (Permit paragraph L.2.)

23 The marina operator shall make available on the uplands
24 an area for the safe collection of used engine oil from
25 marina boats.

26 We find that acceptance of these conditions by the applicant
27 provides adequate protection against pollution of public waters from
oil or fuel introduced on site as a result of the marina.

XV

Surface runoff from upland projects presently discharges in the

1 marina area but does not appear to be adding significant pollution to
2 the marine waters. Sediment analyses do not reveal substantial
3 existing contamination. Many of the pollutants associated with runoff
4 are controlled to some degree by sediment traps and oil separation
5 systems included in Honeywell's storm water system.

6 The upland road and parking features of the marina project will
7 involve upgrading of the existing storm water system to accommodate
8 the run-off from the new impervious surface. However, it was not
9 proven that the new upland development, with the drainage system
10 proposed, would cause adverse affects to the marine environment.
11 Final details of the drainage plan must be approved by the County
12 before on-site work begins.

13 XVI

14 In a hydraulic model study, the tidal flushing characteristics of
15 the original marina proposal, were predicted to be satisfactory in
16 terms of both overall exchange and uniformity of mixing.

17 The revised smaller marina proposal will preserve this
18 satisfactory tidal flushing and circulation, since it includes one of
19 the two circulation gyres identified in the original project.

20 XVII

21 A possible adverse impact could come from the impact of the
22 breakwaters on beach process. The net drift at the site is
23 northward. But the existing rock revetment at the foot of the
24

1 seashore bluff (the BNRR right of way) acts as a stabilization
2 structure preventing sloughing of the bank and thereby aborting the
3 natural beach building process.

4 This circumstance, coupled with the flat and shallow nature of the
5 intertidal area, should mean that the substantial build-up of
6 sediments along the breakwaters and the subsequent starvation of
7 accretion beaches further along the line of drift will not occur.
8 Further, the proposed gap between railroad revetment and the
9 breakwaters will leave movement along the nearshore beach unchanged.

10 On the record, we find that significant impedance of longshore
11 sand and gravel transport is unlikely. We find that the nearshore
12 gap, as a design feature, will probably eliminate significantly
13 detrimental effects of the project on the movement of sand.

14 However, the permit calls for three years of monitoring to check
15 for adverse shoreline changes. Should such change be observed, the
16 built-up sediments will be mechanically removed and deposited on
17 beaches deprived of sediments by the marina's construction. Similar
18 sediment bypass programs have worked effectively at other marinas and
19 the technology involved presents no special problems here.

20 XVIII

21 The tidelands on the proposed marina site are important as part of
22 the corridor used by juvenile salmonids on their outmigration from the
23 Snohomish and Stillaguamish Rivers.

1 If the marina formed a barrier to their passage, forcing them out
2 of the shallows and into the deep waters beyond the outer wall of the
3 breakwater, the effects could be adverse, both in terms of available
4 food and of predation. This is why the design of the project involves
5 leaving a gap between the landward ends of the breakwater and the
6 rock-revetted shore. The idea is to preserve a shallow passage for
7 these juvenile fish.

8 The intertidal beach area above elevation +3 to +4 feet will be
9 maintained free from any dredging, filling or other construction.

10 XIX

11 The fish passage feature of the project is a part of a detailed
12 mitigation plan approved by the County in an attempt to achieve the
13 standard of no net loss in habitat value. Post-construction
14 monitoring of the marina will be conducted to determine the overall
15 effectiveness of the proposed mitigation plan and to develop
16 supplemental mitigation should it appear that the no net loss standard
17 is not being met.

18 There are five separate mitigation projects. Mitigation Area A
19 involves the preparation of a sloped intertidal area along the
20 perimeter of the dredged basin adjacent to the north and south
21 breakwaters walls, (approximately 1.4 acres). Eelgrass will be
22 replanted in these new intertidal areas to provide a replacement
23 habitat.

Mitigation Area B includes the nearshore passage for juvenile salmonids already mentioned. In addition to leaving the unobstructed beach, some small cobbles will be added at intervals to enhance the existing sandy substrate by providing a vertical medium for algae and other organisms to become attached to.

Mitigation Area C involves an offshore intertidal beach area on the lee side of the west breakwater, created by placing clean sand fill from basin dredging adjacent to the toe of the breakwater to form a new shallow water zone. The primary purpose of this offshore beach area is to provide new intertidal habitat for crabs and other marine life attracted to the offshore areas of the project.

Mitigation Area D involves two new cobble enhancement areas, each of about 1/2 acre, one located outside of the north breakwater wall and one located beyond the south breakwater wall. The southerly area will be located offshore in water depths of around -2 to -4 feet. The northerly area will be located closer to shore in water depths between 0 and -1 feet. The purpose of the new substrate zones will be to provide new habitat for dungeness crab. The different water depth zones will allow a comparison of the effectiveness of the enhancement measures so that improvements can be made in the future if needed.

Mitigation Area E will consist of the preservation of approximately one-half of the existing .7 acre hardshell clam bed located near the shoreline at the center of the site. The other half

of the existing bed will be transplanted to a new site covering approximately .7 acres located at the northern boundary of the project.

XX

The mitigation plan was developed to respond to potential resource losses caused by the project. The breakwaters will cover 4.8 acres of presently productive substrate. The moorage basin will mean the removal of 14.6 acres of shallow intertidal shelf and its replacement with a deeper habitat.

With the implementation of the mitigation plan, we find that the project's adverse effects on the marine environment, if any, will be minimal.

The nearshore passage will benefit outmigrating juvenile salmonids. The adult salmonids, to the extent they might otherwise use the shallows at high tide, will simply swim around the marina walls. Moreover, it was not shown that the moorage basin, with its adequate circulation, would be a particularly hostile place for either juvenile or adult salmonids.

Juvenile dungeness crabs were found on the site in moderate numbers, though adults were sparse. Recognizing the high mobility of crabs and the relatively unremarkable shallow environment being altered, we believe the attempt to provide concentrated areas of high quality crab habitat will adequately offset possible losses.

The beach impacted by the project supports a limited shellfish

1 resource. However, the clam beds disturbed by the project will be
2 relocated elsewhere on the BCE property. Geoducks exist in subtidal
3 waters nearby, but the project as now designed should not affect them
4 at all.

5 The intertidal and shallow subtidal areas support abundant
6 populations of epibenthic organisms, the greater density being at the
7 subtidal depths. No radical change in the present predominantly sandy
8 substrate is anticipated, and epibenthic organisms can be expected to
9 rapidly recolonize the unshaded portions of the moorage basin after
10 dredging is complete. The densities found at the deeper areas imply
11 that the proposed basin will not necessarily be detrimental to
12 epibenthic production. Further, the efforts to enhance the epibenthos
13 through mitigation projects appear well calculated to minimize loss
14 should such occur.

15 Some eelgrass exists on the site but it is sparsely spread out
16 over the area and in this state is not a critical component of the
17 habitat. Its replacement in mitigation areas is an adequate response
18 to the modest amount of eelgrass removal which will occur.

19 XXI

20 The marina's southern breakwater will lie about a quarter of a
21 mile from the Franzen home. It will intrude upon the northerly view
22 from the kitchen window. However, a portion of the view from the
23 Franzen property to the north is already blocked by the "Pacific
24

Queen." The rest of the seascape, to the west and south of the
Franzen house, will be entirely unaffected by the marina project.
There was no showing of view blockage at other residences.

It is true that the marina will represent a major change in the
appearance of the waterfront in the area and that the brunt of
accommodation to this aesthetic change will be born by occupants of
the Franzen property. We are unable to find in this, however,
negative impacts on residential use which we would term significantly
adverse.

XXII

The site of the marina is presently available to members of the
Tulalip Tribe for set net fishing. Set nets are used in shallow
waters with one end secured to the bank and the net extending as much
as 600 feet out into the water. The nets are spaced along the beach
at intervals of at least 600 feet. The marina project as presently
planned would occupy three possible set net locations.

The primary season for the use of set nets is in the winter when
steelhead are being caught. A set net is sometimes attached to the
"Pacific Queen" near the Franzen home, but the record does not
demonstrate that the precise site of the marina is commonly used for
set net fishing.

Neither the site at the "Pacific Queen" nor sites north of the
marina would be affected by the project. We were not persuaded that
the marina would adversely affect the set net fishery of the tribe.

XXIII

A line between the "Pacific Queen" and Whidbey Island across Possession Sound forms the southern boundary of fishing area 8A. The Tulalips engage in drift net fishing, starting from this boundary and drifting north.

Area 8A defines what is termed a terminal area fishery; that is, the adult salmonids which enter the area have differentiated themselves from the mixture of stocks swimming in open waters and can be identified as heading for either the Snohomish or the Stillaguamish River system. Within 8A further differentiation occurs, permitting the identification of the separate stocks for each of these river systems. Because at present Stillaguamish stocks are depressed, an effort is being made to concentrate fishing on the Snohomish stocks. To some extent this management policy emphasizes fishing north of the area adject to the proposed marina where the two stocks are still comingled.

It is not possible to tell in percentage terms how important the southern portion of area 8A is to the tribe. It does not account for the majority of fish tribal members have caught in recent years, but it is commonly used by them and they view it as important.

The drift nets may be 1,800 feet long and extend from 70 to 100 feet below the water surface. Normally they are set in water deeper than 50 feet.

1 Occupation of the shallow shoreline shelf by the marina for 1,200
2 feet of shorefront at the southern end of area 8A will not, we find,
3 significantly interfere with the Tribes' drift net fishery. Perhaps
4 some drifts beginning opposite the "Pacific Queen" will be forced into
5 deeper waters than before, but we are persuaded that the impact in
6 terms of the salmonid harvest will be insignificant.

7 XXIV

8 The Tulalips are upon occasion able to fish in areas other than
9 area 8A. However, 8A is the area within which their reservation lies
10 and they predict that in the future they will need to rely most
11 heavily on 8A for their annual catch. Therefore, all fishing space
12 available in the area is of concern to them and they wish to avoid the
13 incremental effects of a multiplicity of projects such as BCE's marina.

14 We are sensitive to this concern but believe that it has been
15 properly accommodated in the overall shoreline planning represented by
16 the SCSMP. We emphasize that the instant project occupies the only
17 shoreline area where marinas are permitted outright by the County
18 between Mukilteo and Edmonds. It occupies a relatively small number
19 of front feet. The predominant portion of unincorporated Snohomish
20 County's marine shoreline has been designated as "conservancy," where
21 marinas are allowed only under restrictive conditional use criteria.
22 In these circumstances the project approval at issue is not likely to
23 function as a precedent resulting in adverse cumulative impacts from
24 requests for like actions in the area.

2 The most worrisome use conflict potential is, we think, posed by
3 the possibility that increased boating traffic from the marina will
4 interfere with tribal drift net fishing.

5 Some amelioration of this potential is inherent in the nature of
6 the marina and the nature of the fishery. The heaviest marina boat
7 traffic is during daylight and drift net fishing traditionally has
8 been carried on at night. This should tend to limit the periods of
9 highest likely conflict to dawn and dusk. Additionally, the peak
10 pleasure boating season is in the summer, while drift net fishing is
11 concentrated in later summer and the fall. There should, therefore,
12 be little overlap of peak use seasons. Furthermore, the BCE marina
13 is designed principally for large cruisers, slow moving enough to be
14 able to see, anticipate and avoid most net entanglement problems, and
15 not the kind of boats one would expect to be used in fishing
16 competition near the marina with drift net fishing.

17 Despite these factors, the County imposed a number of conditions
18 on the BCE permit in an effort to ameliorate potential conflicts
19 arising from increased traffic generated by the marina. They are as
20 follows:

21 All vessels to be moored at any berth within the marina
22 shall carry liability insurance, which insurance shall
23 include fishing net damage among its coverages. (Permit
24 paragraph 0.1.)

1 Weatherproof notices alerting boaters to the presence of
2 commercial fishing boats shall be prominently displayed
3 throughout the marina (for example, in the moorage
4 offices, in the yacht club area, in the owners'
5 association area, at each entry structure, etc.) during
6 both Indian and non-Indian fish openings. (Permit
7 paragraph 0.4.)

8 Information about gill net, purse seine and set net
9 fishing methods and equipment shall be distributed to
10 every initial and every new moorage customer of at no
11 direct expense to said customer. (Permit paragraph 0.5.)

12 The applicant shall provide one 32 foot long moorage
13 berth at no cost for temporary emergency use by Tulalip
14 Tribal fishermen during commercial fishing operations in
15 Possession Sound. Temporary emergency use shall be
16 defined as relating to engine malfunction, damage to
17 fishing gear or injury to fishing crew. The marina will
18 assign the location of the Berth on an "as needed" basis
19 by the Tribe. (Permit paragraph 0.8.)

20 The marina will construct and install a 15'x 15'
21 floating, covered net shed as shown on Exhibits 33 and
22 42 for the exclusive use of the Tulalip Tribes. The
23 purpose of the net shed will be to allow Tribal
24 fishermen, who are fishing near the marina, to
25 immediately replace damaged nets so that any
26 interruption to their fishing activity is reduced to a
27 minimum. The net shed is not to be used for any other
purpose. (Permit paragraph 0.9.)

Finally, the permit sets forth a condition which calls for
post-construction monitoring of marina traffic impacts and a study to
determine the need for additional mitigation measures to prevent
conflicts between the marina and tribal fishing operations. If the
study shows significant marina boat traffic impacts on Tulalip
fishermen, the following supplemental boat traffic mitigation plan
will be implemented:

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1 During peak Tulalip Tribal drift gill net fishing
2 operations which are conducted within one-half nautical
3 mile of the project site, the marina will supply and
4 operate a pilot boat. The purpose of the pilot boat
5 will be to monitor boat traffic entering and exiting the
6 marina. The pilot boat will advise boaters of the
7 presence of tribal fishing operations off-shore of the
8 marina and suggest routes to avoid encountering nets.
9 The pilot boat will remain continuously on duty during
10 tribal fishing operations off-shore of the marina.
11 (Permit paragraph P.)

12 We find implicit in the acceptance of these conditions on boat
13 traffic conflicts an undertaking by BCE to include them as provisions
14 in covenants recorded against the property and enforceable against
15 subsequent owners.

16 With these conditions, we believe that conflict with tribal
17 fishing from the marina's boat traffic will be minimized insofar as
18 practical and that in the end significant interference with tribal
19 fishing will not persist.

20 XXVI

21 Berths at the proposed marina will be offered on a rental basis,
22 as condominium moorage, or as a mixture of rentals and condominiums,
23 depending on market conditions. Marina rights are not included as
24 part of the package in the sale of upland housing units at Harbour
25 Pointe. The developer of the marina is convinced that the project, at
26 the size and configuration now proposed, will be commercially viable
27 standing by itself.

Appellants have not demonstrated that any other kind of use of the
"urban" designated shoreline at this locale would make economic sense.

XXVII

We find that, as a practical matter, the proposed marina will not be able to function unless an access channel into it is dredged in the subtidal area.

Also, given the steep bank and existing railroad right-of-way, we find that constructing a facility for launching boats from the uplands at this site would cause environmental damage and create a safety hazard. It was not proven that the marina would remain feasible if such a boat launch had to be added to the project.

XXVIII

The rubblemound breakwaters placed around the "urban" designated moorage basin will occupy only a small portion of "conservancy" shoreline, limited to the boundary area between the two generic types of planning environments.

The marina, as proposed, is compatible with the "urban" designation on BCE's property in the SCSMP. Appellants have not shown that a smaller marina, confining the breakwaters to the "urban" area, would be economically feasible.

We have found that neither significant adverse environmental effects nor significant use conflicts are likely to flow from the project, as designed and conditioned. Under the circumstances, we decide that it has not been proven that the modest intrusion of the breakwater, into the "conservancy" zone would be incompatible with the surroundings or the master program.

XXVIX

A final environmental impact statement was issued in February of 1985, after appropriate circulation of draft documents. The impact statement discussed the impacts of a considerably larger marina project for the site, a project contemplating 840 berths covering 42 intertidal and subtidal areas, involving much more dredging, much more parking and much more intrusion into the "conservancy" environment.

Addendum No. 1 to this document was issued in early 1986, dealing with an 800 berth configuration. Addendum No. 2 was issued in October 1986 and provided information relating to the scaled-down project presently proposed, including a detailed description of mitigation measures, and discussion both of impacts on the natural environment and of potential use conflicts with Tulalip fishermen.

All of these environmental documents were before the County when the decision to issue the permit to SCE was made.

XXX

We have reviewed the environmental documents relied upon and find that they disclose the potential impacts of the project with a reasonable probability of having a more than moderate effect on the quality of the environment. The thoroughness of this disclosure was, we find, adequate to provide the basis for an informed decision.

XXXI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 87-5 & 87-6

1 From these Findings the Shorelines Hearings Board comes to the
2 following

3 CONCLUSIONS OF LAW

4 I

5 The Board has jurisdiction over the parties and the subject matter
6 of this proceeding. RCW 90.58.180. Appellants bear the burden of
7 proof. RCW 90.58.140(7).

8 II

9 We review the proposed development for consistency with the
10 Shoreline Management Act (SMA) and the Snohomish County Shoreline
11 Management Master Program (SCSMP). RCW 90.58.140(2)(b).

12 III

13 The permit system of the SMA is inextricably interrelated with and
14 supplemented by the requirements of the State Environmental Policy Act
15 (SEPA), chapter 43.21C RCW. Sisley v. San Juan County, 89 Wn.2d 78,
16 569 P.2d 712 (1977). The Board's function includes review of
17 compliance with the requirements of SEPA.

18 IV

19 Appellants here assert the inadequacy of the environmental impact
20 statement (EIS). Against such a challenge the decision of the
21 government agency which issued the statement is entitled to
22 substantial weight. RCW 43.21C.090.

23 When the adequacy of an EIS is at issue, the question to be
24 answered is whether the adverse environmental effects of the proposal
25

1 and reasonable alternatives are adequately disclosed, discussed and
2 substantiated. Leschi Improvement Council v. Highway Commission, 84
3 Wn 2d 271, 525 P.2d 774 (1974). SEPA does not require that every
4 remote and speculative consequence of a project be included in the
5 EIS. Cheney v. Mountlake Terrace, 87 Wn 2d 338, 552 P.2d 184 (1976).

6 V

7 We conclude that the environmental documents relied on here
8 contain an adequate exposition of probable environmental impacts of
9 the project and that they meet the rule of reason. As a matter of
10 law, we hold, SEPA was complied with.

11 VI

12 The policy of the SMA emphasizes the preservation and promotion of
13 navigation. Fishing is an incidental right included within the
14 concept of navigation. Wilbur v. Gallagher, 77 Wn 2d 306, 462 P.2d
15 232 (1969). Marina construction is directly in aid of navigation and
16 is among those uses given explicit priority by the statute. RCW
17 90.58.020.

18 Where boating and fishing activities conflict, the policy of the
19 SMA is, where possible, to reconcile the uses by preventing the one
20 from unreasonably obstructing or interfering with the other. See
21 Beach Mining v. Pacific County, SHB No. 81-50 (1984).

22 We conclude that the project under review, as extensively
23 conditioned, exemplifies the kind of accommodation between favored
24 uses contemplated in the SMA. However, in order to insure that the
25

1 permit conditions directed to alleviating use conflicts remain
2 effective throughout the operation of the project, an additional
3 condition should be included in the permit as set forth in Conclusion
4 of Law X (3).

5 VII

6 The policy of the SMA rejects "piecemeal" and "uncoordinated"
7 shoreline development in favor of rational planning for "reasonable
8 and appropriate uses." RCW 90.58.020. To this end local master
9 programs have been developed and adopted through legislative
10 processes. RCW 90.58.120.

11 Here the mandated planning effort resulted early-on in the
12 designation of the vast majority of the proposed marina site as an
13 "urban" environment where marinas are expressly permitted. (SCSMP,
14 pp. E-17, 18, F-40), a planning choice approved by the state after
15 evaluation and review. WAC 173-19-390.

16 The proposal actually to build a marina on the site must be seen,
17 therefore, as the contemplated result of the planning process set in
18 motion by the SMA.

19 VIII

20 The policy of the SMA strongly endorses the promotion of increased
21 access by the public to the state's shorelines. RCW 90.58.020.
22 Because the project at issue will improve boating access to public
23 waters by providing needed moorage, as well as providing the means for
24

1 the public at large to enjoy a waterfront site which is now all but
2 inaccessible, the proposal is consistent with the Act's public access
3 provisions.

4 However, to insure that the plans for public access are
5 implemented throughout the life of the project, additional conditions
6 should be included in the permit as set forth in Conclusion of Law X
7 (2), (3).

8 IX

9 The policy of the SMA contemplates development which protects
10 against adverse effects to the aesthetics and the ecology of the
11 shoreline. RCW 90.58.020. The instant projects' design, coupled with
12 the mitigation program to be undertaken, conforms with the
13 environmental protection aims of the SMA. The impact on the Franzen's
14 property was not shown to be so adverse as to violate aesthetic
15 policies.

16 X

17 We hold that the proposed marina is consistent with the general
18 policy for shorelines of the SMA, if the following additional
19 conditions are added to the permit.

20 1. The public access features included in the plans for the
21 project shall be incorporated in covenants which are recorded against
22 the property and binding upon any subsequent owners.

2. During the life of the project, the public access features of the marina project shall be clearly indicated by appropriate signs at appropriate and clearly visible locations.

3. The permit conditions relating to the amelioration of conflicts between tribal fishing and marina boat traffic (See Finding of Fact XXIV) shall be incorporated in covenants which are recorded against the property and binding upon any subsequent owners.

XI

The subtidal area within the "conservancy" environment in which part of the western breakwater will lie and where the access channel dredging will occur is a shoreline of statewide significance.

RCW 90.58.030(e)(iii).

The SMA's policy with respect to such shorelines contains a list of use preferences (RCW 90.58.020) which are set forth in the SCSMP as "management principles" and elaborated through "development guidelines." SCSMP, pp. H-1 through H-3. The use preferences focus on the state-wide and long-term interest, on preserving the natural environment and protecting its resources, and on increasing the accessibility and use of shorelines for the public.

Given the impacts of the project as a whole in meeting regional moorage demand and improving public access while inflicting no significant environmental damage, we conclude that the limited intrusion of the marina project into the shorelines of statewide

1 significant cannot be said to violate the policies for such shorelines
2 as implemented by the SCSMP.

3 XII

4 The master program sets forth relevant use regulations for
5 "breakwaters", "dredging", and "marinas."^{1/} All of these uses are
6 permitted outright in "urban" environments subject to generally
7 applicable regulations. SCSMP, pp. F-14, F-22, and F-40.

8 The applicants argue that the project violates the general use
9 regulation for "breakwaters" which states:

10 Breakwaters shall not impede longshore sand and gravel
11 transport unless such impedance is found to be
12 beneficial. SCSMP p. F-14, General Regulation No. 2.

13 We disagree. The regulation must be read in conjunction with the
14 SCSMP policy for "breakwaters" which states:

15 Construct solid breakwaters only where design
16 modifications can eliminate potentially significant
17 detrimental effects on the movement of sand and
18 circulation of water. SCSMP p. F-13, Policy No. 2.

19 With the site conditions here and the designed gap along the nearshore
20 beach, we have found significant impedance of longshore sand and
21 gravel is not likely. We believe that "significant impedance" is the

22 ^{1/} We concur with Snohomish County that the use regulations for
23 "commercial development" need not be reviewed here in light of the
24 project's inclusion within the more specific subcategory of "marinas."

1 necessary predicate to violation of the provisions of General
2 Regulation 2 (quoted above). We conclude that the project at issue is
3 consistent with the SCSMP's general requirements for "breakwaters."

4 XIII

5 The general use regulations for "marinas" include the following:

6 Marinas shall provide for at least one method of boat
7 launching as an integral part of the facility. SCSMP
8 p. F-38, General Regulation No. 3.

9 This requirement is a performance standard for all marinas which is
10 omitted from the BCE proposal. To authorize this omission, the
11 project applicant sought a variance.

12 The SCSMP criteria for variances are as follows:

13 Variances deal with specific requirements of the Master
14 Program, and their objective is to grant relief when
15 there are practical difficulties or unnecessary hardship
16 if the strict letter of the Master Program were carried
17 out. The applicant must show that if he complies with
18 the provisions of the Master Program he cannot make any
19 reasonable use of his property. The fact that he might
20 make a greater profit by using his property in a manner
21 contrary to the intent and provision of the Program is
22 not a sufficient reason for variance approval. A
23 variance will be granted only after the applicant can
24 demonstrate the following:

- 25 1. The hardship which serves as the basis for granting
26 the variance is specifically related to the property of
27 the applicant and does not apply generally to other
property in the vicinity in the same Environment;
2. The hardship results from the application of the
requirements of the Shoreline Management Act and Master
Program and not from deed restrictions or the
applicant's own actions;

2 3. The variance, if granted, will be in harmony with
the general purpose and intent of the Master Program;

3 4. Public welfare and interest will be preserved; if
4 more harm will be done to the area by granting the
variance than would be done to the applicant by denying
it, the variance shall be denied.

5
6 SCSMP, p. F-4, F-5.

7 Appellants argue that granting a variance from the boat launch
8 requirement violates the language mandating denial unless the
9 applicant shows "he cannot make any reasonable use of his property" if
10 he complies with the strict letter of the master program. They point
11 out that permitted recreational uses are available in the absence of a
12 marina, and assert that the boat launch is left out of the marina
13 plans because it would adversely affect the project's economic
14 feasibility.

15 Two considerations lead us to reject appellant's position: the
16 "urban" designation of the project site, and the burden of proof in
17 reviews before this Board.

18 Whether the "urban" designation is appropriate for the center
19 portion of BCE's ownership is not before us. The legislative adoption
20 and approval of the SCSMP embodies the broad-scale planning process of
21 the SMA which forms the framework for the permit system. See
22 RCW 90.58.140(2). Our task on review of a variance is to construe how
23 the adopted hardship criteria are to be applied where an "urban"
24 designation has been made.

25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
27 SHB NO. 87-5 & 87-6

1 "Urban" environments are selected for the most high-intensity use
2 pattern allowed under the master program. See SCSMP, pp. E-3, E-4.
3 Nearly all generic use categories listed in the program are allowed in
4 "urban" areas, including numerous activities which are pursued for an
5 economic return. See SCSMP, p.F-3. The designation presupposes, we
6 think, some sort of business activity on private lands. We do not
7 believe the SCSMP drafters contemplated that private owners would be
8 obliged to dedicate their "urban" property entirely to unremunerated
9 public recreational use.

10 We conclude that the designation of an area as "urban" implies an
11 intent to allow owners of private lands within the area to engage in
12 activities with the potential for a profitable economic return.

13 Accordingly, within the context of an "urban" environment the
14 terminology "any reasonable use" carries the meaning "any reasonable
15 economic use."

16 With the SCSMP variance requirements so construed we conclude
17 that, under the facts, the BCE project is entitled to the boat launch
18 variance. The only reasonable economic use of the site identified
19 here is the marina, as designed and conditioned. On review of the
20 granting of a permit the burden is on the appellant to show either
21 that some other use of the site is economic or that use of the
22 site for the desired activity, without the variance is economic.
23 Otherwise an attack based on the "any reasonable use" criterion must
24 fail. No such showing was made in this case.

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 87-5 & 87-6

2 We have reviewed the additional criteria in the four numbered
3 paragraphs dealing with variances under the SCSMP and perceive no
4 inconsistency of the boat launch variance with any of them. The
5 hardship is directly related to the physical nature of the property
6 with its steep bank and the existing BNRR railroad revetment. The
7 problem arises from a requirement the master program imposes. No
8 disharmony with the master program's general purposes and intent has
9 been identified. The variance itself serves the public welfare and
10 interest by eliminating a project feature which would pose a safety
11 hazard and increase environmental disruption.

12 We hold that the boat launch variance must be sustained.

13 XIV

14 The remaining issues concern the "overflow" of this project into
15 the "conservancy" environment.

16 The SCSMP regulations for "dredging" in a "conservancy" area state:

17 Dredging within the conservancy environment shall be
18 limited to the maintenance of existing navigation
19 channels and facilities. SCSMP, p. F-23, Conservancy
20 Regulation No. 1.

21 BCE sought and received a variance from this limitation in order
22 to create a new navigation channel to permit passage from the marina
23 moorage basin to the deep subtidal waters. Again this variance was
24 challenged as failing the "any reasonable use" criterion.

25 Our analysis is similar to that contained in the preceding

1 conclusion. Absent an access channel, a functional marina is
2 precluded. No other reasonably economic use of the property has been
3 identified. Thus, no violation of the "any reasonable use" standard
4 has been shown.

5 It might be objected that the term "reasonable use" does not
6 necessarily imply "reasonable economic use" in a "conservancy"
7 environment. We would agree. But under the facts we are not
8 concerned with whether the dredging limitation will preclude use of
9 the "conservancy" area. The problem here is whether the restriction
10 on dredging will block reasonable economic use of the adjacent "urban"
11 area. The variance criterion speaks to preventing any reasonable use
12 of the applicant's property. That the restriction preventing such use
13 does so by operating on neighboring property is not relevant to the
14 issue addressed.

15 Our review has also included the numbered variance criteria. We
16 conclude that the access channel dredging variance must be
17 sustained.^{2/}
18

19
20 ^{2/} Arguably, the maintenance dredging limitation is not a
21 performance standard, but rather the description of an allowable use.
22 The variance requested, accordingly could be viewed as a use variance
23 which is not allowed under the criteria employed by the Department of
24 Ecology in reviewing locally issued variances. WAC 173-14-150. This
25 approach would get us into the thorny area of whether DOE's criteria
26 are to be applied when they are more stringent than the local program.

The SCSMP regulations for "marinas" make them a conditional use in "conservancy" environments on marine waterfront. SCSMP, p. F-39, Conservancy Regulation 2. Solid type breakwaters also are a conditional use in the "conservancy" environment.

Conditional use permit approval was given both for "marinas" and for "breakwaters" to the extent the BCE proposal extends beyond the "urban" area.

The provisions of the SCSMP on conditional uses are as follows:

The objective of a conditional use provision is to provide more control and flexibility for implementing the regulations of the Master Program. With provisions to control undesirable effects, the scope of uses within each of the five Environments can be expanded to include a greater range of uses.

Uses classified as subject to the issuance of a conditional use permit can be permitted only by meeting such performance standards that make the use compatible with other permitted uses within that area.

Conditional use permits shall be granted only after the applicant can demonstrate all of the following:

See WAC 173-14-155; Strand v. Snohomish County, SHB No. 85-5 (1985). If DOE's criteria were applied here, the appropriate thing would be to treat the variance request as an application for an "unclassified" (unlisted) conditional use permit under WAC 173-14-140. The net effect would be the necessity for applying a standard which allows such a use only when the applicant can demonstrate that "extraordinary circumstances preclude reasonable use of the property in a manner consistent with the use regulations of the master program." WAC 173-14-140(2). Because we see this as essentially the same standard as that set forth in the SCSMP variance provisions, we do not think it is necessary to decide the "use variance" issue in this case.

1. The use will cause no unreasonably adverse effects on the environment or other existing or potential uses which are allowed outright in the subject Environment;
2. The use will not interfere with public use of public shorelines;
3. Design of the site will be compatible with the surroundings and the Master program;
4. The proposed use will not be contrary to the general intent of the Master program.

The crux of the conditional use criteria is the concept of compatibility. If a use which is neither prohibited nor permitted outright in a particular area can be placed at a particular site in that area without undue disruption of other uses and without significant harm to the environment, then conditional use approval is appropriate.

Under the facts here after evaluation of the conditional use features of the BCE marina project in light of the master program criteria quoted above, we conclude that the conditional use approvals given were proper under the SCSMP.^{3/}

XVI

An appropriate additional consideration in relation to all of the approvals given here -- substantial development permit, variances, conditional use approvals -- is their potential cumulative effects.

^{3/} We have applied the SCSMP criteria after concluding that the requirements of the master program for listed conditional uses are at least as stringent as those of WAC 173-14-140.

See Hayes v. Yount, 87 Wn. 2d 280, 552 P.2d 1038 (1976).

Because there is no other "urban" shoreline in the vicinity, the possibilities for a multiplicity of applications for like activities in the area are almost nil. The instant approvals are not likely to lead to additional authorizations for similar developments such that the totality would be inconsistent with the SMA and SCSMP. We conclude that the marina should not be rejected on the basis of possible cumulative effects.

XVII

We have reviewed all other issues presented and find them to be without merit. We note that the Board is without authority to quiet title to real property or otherwise adjudicate boundary disputes. *Labusohr v. King County*, SHB No. 84-62 (1985).

XVIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The actions of Snohomish County, as approved by the Department of Ecology, in granting permission under the Shoreline Management Act for the marina proposed by BCE Development Incorporated are affirmed. The matter is remanded to Snohomish County for the issuance of a permit containing the additional conditions set forth in Conclusion of Law X.

DONE this 29th day of June, 1988.

SHORELINES HEARINGS BOARD

(See Dissenting Opinion)
JUDITH A. BENDOR, Presiding

(See Concurring Opinion)
WICK DUFFORD, Chairman

Lawrence J. Faulk 6/28
LAWRENCE J. FAULK, Member

Nancy R. Burnett
NANCY R. BURNETT, Member

Robert C. Schofield
ROBERT SCHOFIELD, Member

William T. Geyer
WILLIAM T. GEYER, Member

FINAL FINDING OF FACT
CONCLUSIONS OF LAW AND ORDER
SHB NO. 87-5 & 87-6

1 CONCURRING OPINION - WICK DUFFORD

2 The result reached by the Board in this case is, I think, the
3 proper one, given the "urban" designation on the site in the Snohomish
4 County Shoreline Master Program. The singling out of this specific
5 chunk of private waterfront for this most-intensive use designation
6 presupposes an intention that some activity with the potential for a
7 return on investment was contemplated for the site as a part of the
8 planning process. A marina is the only such use identified in these
9 proceedings.

10 I am disturbed, however, by the difficulty in squaring this, I
11 think, intended result with the provision of the master program's
12 variance section which states:

13 The applicant must show that if he complies with the
14 provisions of the Master Program he cannot make any
reasonable use of his property. SCSMP, P. F-4.

15
16 Neither in its own permit procedure nor in its presentation to this
17 Board did the County satisfactorily reconcile the decisions to grant
18 the two variances in this case (boat launch and access channel
19 dredging) with the quoted language.

20 The standard found in the SCSMP was originally enacted under the
21 Department of Ecology's guidance. WAC 173-16-070. DOE long ago
22 (1981) amended its own regulation on this point to include a more
23 flexible formula. See WAC 173-14-150(3)(a). However, DOE's adoption
24 of revised variance criteria did not, by itself, amend any local
25 master program.

26
27 CONCURRING OPINION -
WICK DUFFORD
SHB Nos. 87-5 & 87-6

DOE's regulation is an invitation to local governments to reconsider their variance provisions. Snohomish County needs to review these provisions and decide if its present master program variance criteria are what it really wants.

In the instant case, denial of the variances would be the tail wagging the dog. Without the variances there could be no marina in the designated "urban" area. In particular, it makes no sense, to authorize a marina as a permitted use on an identified parcel and then, sub silentio, to prohibit any such thing by making navigational access impossible to obtain.

However, though the variance language can be interpreted here to accommodate the overall intended result, this may not always be true. I am fearful that unless the County addresses this issue legislatively, it may be faced with results in other cases which differ radically with what was intended in the shoreline planning process.

Wick Dufford
WICK DUFFORD, Chairman

CONCURRING OPINION -
WICK DUFFORD
SHB Nos. 87-5 & 87-6

1 BENDOR - Dissenting Opinion

2 I respectfully dissent.

3 In basic terms, this Board is faced with determining whether the
4 proposed 340-berth marina with solid breakwaters to be located in
5 Possession Sound in the Shoreline Conservancy Environment,
6 impermissibly interferes with existing fishing in violation of the
7 Shoreline Management Act ("SMA") Chapt. 90.48 RCW, its' implementing
8 regulations Chapt. 173-14 WAC, or the Snohomish County Shoreline
9 Master Program ("SMP").

10 I conclude that the marina with its' present size and
11 configuration, including 4.8 acres of solid breakwaters within the
12 Conservancy Environment, and with the western portion of the
13 breakwater within a Shoreline of Statewide Significance, violates the
14 Act, its' regulations, and the Program, and therefore the permit
15 should be reversed. In so concluding, this Opinion fully recognizes
16 that both fishing and recreational boating are water-dependent uses,
17 and as such are entitled to use preferences under the law. RCW
18 90.48.020. A redesigned marina entirely within the Urban Environment
19 might be permissible under the law. But such facts are not before us,
20 and therefore any such consideration would necessarily await another
21 proceeding and another day.

22 I

23 The Shoreline Management Act, and the local SMP embody the state
24 public trust doctrine. Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989

25 DISSENTING OPINION
26 JUDITH A. BENDOR
27 SHB Nos. 87-5&6

(1)

1 (1987); Accord, Orion Corporation v. State, 109 Wn.2d 621, ___ P.2d ___
2 (1987). In conformance with that trust, the State has the
3 responsibility to safeguard all citizens' ability to fish. The public
4 has an intense interest in prohibiting uses which would endanger the
5 integrity of the fishing industry, "a major contributor to the
6 economic health and welfare of Washington citizens." Orion, supra, at
7 661. All citizens including Indian Tribes are protected by this
8 public trust. The SMA is to be liberally construed to effect its'
9 objectives and purpose. RCW 90.58.900. See, Hama Hama v. Shorelines
10 Hearings Board, 85 Wn.2d 441, 536 P.2d 157 (1975); Tulalip Tribes et
11 al., v. BCE Development, et al., SHB Nos. 87-5 and 87-6 (Order
12 Granting Motions to Dismiss Certain Legal Issues, July 23, 1987, at
13 VI.)

14 II

15 The Tulalip Tribes extensively fish the waters of the marina
16 site. The Tribes depend in large measure on fishing for their
17 livelihood. Fully one-half of the Tribal members are involved with
18 fishing to some degree. The Tribes have invested significant
19 resources in developing their fishing, and have established a fish
20 hatchery to replenish the stock.¹

21
22 1 By federal treaty, the Tribes agreed to a smaller reservation on
23 land because they would be allowed to fish the waters. Since the
24 Boldt decision, Indian fishing has increased, reflecting increased
25 reliance on delineated treaty rights. Specific Indian treaty rights,
26 however, do not form the basis of this Opinion.

25 DISSENTING OPINION
26 JUDITH A. BENDOR
27 SHB Nos. 87-5&6

1 Fishing is a very site specific activity and can only occur where
2 the fish are. In shallow water, the Tribes attach one end of their
3 set nets to the shore and pull the nets tight in the water. Set net
4 fishing is used to catch steelhead and coho salmon which migrate along
5 the shore. The Tribes also fish with gill nets in deeper waters
6 generally 70 feet or deep more. The Tribes also clam in the marina
7 area, with the shellfish forming a basic part of their diet.
8 (Commercial shellfish harvesting, however, has not received state
9 certification, due in part to the proximity of a sewage outfall.)

10 The salmon sockeye run is primarily fished in August and the first
11 half of September, during a season when recreational boating activity
12 is intense. In the past, fishing had only occurred at night. With
13 the development of monofilament nets, which are less detectable by
14 fish, fishing now is also done in the daytime.

15 III

16 The proposed marina has an extensive rubblemound solid breakwater
17 covering 4.8 acres of tidal land, which as currently designed intrudes
18 into the Conservancy Environment. The rest of the marina structurally
19 is within the Urban Environment. Because of this intrusion into the
20 Conservancy Environment, a conditional use permit had to be applied
21 for, and was granted by Snohomish County.

22 IV

23 The Importance of the Area

24 For purposes of fishery management, through governmental and
25

26 DISSENTING OPINION
27 JUDITH A. BENDOR
SHB Nos. 87-5&6

1 Tribal agreement, Puget Sound has been divided into fish management
2 areas. The heart of the Tulalip Tribes' fishing now, and increasingly
3 in the future, is Area 8A which includes the marina site, Possession
4 Sound, Port Gardner Bay, and Port Susan Bay. Area 8A is the "terminal
5 management area" for those salmon and steelhead returning to the
6 Snohomish and Stillaguamish Rivers. The Tulalips' reservation lies
7 immediately north of the Snohomish River.

8 The marina site is in an area within 8A that is particularly
9 important to the Tribes. The boundary between Management Areas 8A and
10 9 is located east from the Pacific Queen shipwreck on the Franzen
11 property, westerly to Whidbey Island. This boundary is known as the
12 "Front", because migrating anadromous fish mill there in great
13 abundance before separating to journey north and south to respective
14 rivers. So valuable is this boundary area, that people who fish
15 sometimes arrive days ahead of an opening day to gain a favorable
16 position at the Front. This Front is located immediately adjacent to
17 and within the proposed marina site.

18 Within 8A the Tulalips have increased opportunities to fish, e.g.
19 more ("open days"), and to manage the resource. Within that Area, the
20 Tribes primarily fish those runs that are returning to the Snohomish
21 River, because the Stillaguamish runs are severely depleted. The
22 Tribes also fish in other Areas, particularly Area 7 off the San Juan
23 Islands. Only three Tribal boats fish there, but a significant
24 proportion of the Tribes' total catch is taken in that Area. By

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1 agreement, the Tribes have to varying degree been precluded from
2 fishing other Areas, e.g. in five years only three open days in Area 9.

3 Area 8A is critically important to the Tulalip Tribes for other
4 reasons. The area is very close to the Reservation. Thus fishing in
5 8A is more accessible economically to all Tribal members. Less travel
6 time and gas are spent in catching the fish there, as compared with
7 the longer trip to the San Juans which also requires more expensive
8 boats.

9 All the Tribes' set net fishing is done in Area 8A. With set net
10 fishing, small skiffs, essentially outboards, can be used. The 400 to
11 600 foot set nets themselves are relatively inexpensive, only costing
12 \$500.

13 In contrast, gill nets which are approximately 1,800 feet long,
14 cost about \$3,000. Few tribal members have spare ones. Gill net
15 fishing requires the boats and the nets to drift with the tide, thus
16 increasing their vulnerability. If these drifting nets are
17 significantly damaged by recreational boats or in-water structures,
18 the Tribes' primary economic losses are consequential damages from
19 lost fishing time, during that narrow window afforded during "open
20 days". The direct economic losses from repairing or replacing a
21 damaged net, while possibly significant, can be far less than these
22 consequential losses. Therefore, because it is concluded that the
23 proposed marina will significantly increase the risks of uncompensated
24 consequential losses, its' construction and operation will deter the

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1 Tribes from fishing in an accustomed area. Boaters' insurance
2 policies covering only direct net damage losses will do little to
3 mitigate this. (See Paragraph VI, below.) Area 8A is already subject
4 to heavy boating use, so much that it is known as "Torpedo Alley",
5 reflecting the use conflicts. With the proposed Navy Homeport in
6 Everett and its' vessel traffic with the wide separations required
7 when naval vessels are underway, the Tribes' ability to productively
8 fish would be further impacted and detrimentally affected.

9 VI

10 A marina shoreline permit condition requires the marina to make
11 available to the Tribes an emergency berth and shed for repairing
12 damaged nets. Boat owners would be required to carry liability
13 insurance for damage to fishing nets. But insurance does little to
14 such mitigate impacts on fishing, particularly the consequential
15 damages from lost fishing time due to net damage and the inherent
16 avoidance of productive fishing areas. An insurance claims procedure
17 is hardly the type of expeditious procedure geared to the exigences of
18 a short fishing season. As a mitigation measure, insurance falls
19 woefully short. While the emergency berth and education measures are
20 commendable, they do not off-set the impacts on fishing.

21 VII

22 The permit also requires the marina one year after construction to
23 undertake a study of the impact of boating on fishing. Unfortunately,
24 this condition fails to provide procedural safeguards such as embodied
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1 in the State Environmental Policy Act process, whereby government has
2 the ultimate responsibility to determine impacts. See, Chapt. 43.21C
3 RCW; Chapt. 197-11 RCW.

4 In this permit condition, the marina will select the consultant,
5 without requiring prior consultation with the governmental entities or
6 the Tribes. The Coast Guard and Snohomish County will help determine
7 the study's scope, and the Tribes will be consulted. Thereafter,
8 according to the permit condition, the marina-selected consultant
9 alone will determine whether significant boat traffic impacts are
10 occurring. Only if that consultant determines that impacts merit
11 mitigation would those measures so firmly outlined in Finding of Fact
12 XXV (other Opinion) be implemented.

13 Such a "condition" verges on questionable delegation of authority,
14 and procedurally does not inspire confidence.

15 VIII

16 The SMA specifically allows development of the shorelines "while
17 allowing a limited reduction of the rights of the public in navigable
18 waters, ..." RCW 90.48.020; Emphasis added. In this instance, two
19 water-dependent uses conflict. Therefore, since the burden has been
20 proven that an existing preferred use will be interfered with and
21 adversely impacted, the burden shifts to respondents permit issuers
22 and permittee to demonstrate that the proposed project is the least
23 intrusive one necessary to afford relief. This legal approach
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1 incorporates the classic balancing test found where rights conflict,
2 and places the rebuttal evidentiary burden on the party which is most
3 likely to have such data.

4 X

5 In this instance, the marina extends beyond the Urban Environment
6 into the Conservancy Environment, beyond the area in which marinas are
7 permitted without special governmental action and special
8 circumstances. SMP at F-3, Compatibility Matrix. A conditional use
9 permit is required. The marina is partially within an admittedly
10 anomolous Urban Environment, one entirely surrounded by Conservancy
11 areas. In this instance, the urban-type marina use in its' present
12 scope, conflicts and significantly impacts fishing which is a prior
13 unconditional use under the SMA and SMP. On balance, therefore, this
14 marina does not fulfill either the State or the SMP requirements for
15 issuance of a conditional use permit.

16 Conditional uses are less desirable among competing uses. See,
17 Murray v. Jefferson County, SHB No. 81-14 upholding denial of
18 conditional use permit. Where fishing rights are allowed outright
19 under the SMA/SMP, and are not burdened by such conditional use
20 criteria, and the proposed project with its' solid breakwater is a
21 less desirable use in the Conservancy environment, and requires
22 special governmental action, then by the very structure of the SMA and
23 SMP provisions, fishing should prevail. A balancing of conflicts
24 requires no less. WAC 173-14-140; SMP at F-4.

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XI

Moreover, the SMA use preferences are also violated, in that the natural character of the Conservancy Environment will not be preserved, and the State-wide interest in protecting fishing will be subsumed to local needs for added moorage space. RCW 90.48.020

SMP Goals, Policies and Objectives will also be contravened, in particular the Conservancy Environment Management Criteria which give preference to uses which do not permanently deplete the physical resources of the Environment. SMP, E-10 at No. 1. (The permanency of the breakwater is unarguable.) Moreover, the SMP encourages the sustained yield management of natural resources in the Conservancy Environment. E-10 at No. 7. The breakwater will impermissibly interfere with the Tribes' fishing and its' sustained yield management of Area 8A anadramous fish stock.

XII

Assuming, even arguendo, that some sort of economic feasibility test were appropriate, there is no probative evidence in this record that this marina is the minimum size necessary to be economically feasible. Moreover, the possibility that this size marina provides "greater profit", is not sufficient reason to grant a variance permit. To the contrary, the SMP explicitly states that it is not a sufficient reason. SMP, at F-4. In addition, to meet the variance requirements' "unnecessary hardships" test, a "taking" in a

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1 constitutional sense has to be proven. See, Kooley and Pierce County
2 v. DOE, SHB No. 218, upholding denial of variance permit using the
3 "any reasonable use" standard.² Such "taking" has clearly not been
4 demonstrated.

5 XIII

6 This Opinion concludes that appellant Tulalip Tribes have
7 sustained their burden by a preponderance of the evidence that there
8 will be significant impacts on fishing from the construction and
9 operation of this 340-berth marina, impacts which are not adequately
10 mitigated. The marina will interfere with existing and potential
11 increased Tribal fishing, interfere with the Tribes' use of the
12 shoreline, and is contrary to the general intent and purposes of the
13 SMA and SMP, as well as specific enumerated regulations, in particular
14 State and local conditional use requirements at WAC 173-14-140 the SMP
15 Conditional Use requirements, and the SMP variance requirements.
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17

18 2 The Members' efforts to resolve the variance issue ("a reasonable
19 use" versus "any reasonable use"), is contravened by past SHB
20 decisions. Strand v. Snohomish County et al., SHB No. 85-4 variance
21 permit reversed; Simcnuk and Pierce County v. DOE et al., SHB No.
22 84-64, more restrictive SMP criteria applied, variance denied.
23 Moreover, Member Dufford's Concurrence, with its' overt invitation to
24 Snohomish County to amend its' SMP, makes clear the gap in the Other
25 Opinion.

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1 The permit should be VACATED and REMANDED to Snohomish County.

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4 JUDITH A. BENDOR, Member
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